83-86

No.

Office-Supreme Court, U.S.
FILED
JUL 14 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

S. E. NICHOLS OF OHIO, INC.,

Petitioner,

—VS.—

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Questions Presented

1. Where a court of appeals held that it must uphold the NLRB's findings of fact concerning a constructive discharge of an employee "as long as those findings are supported by substantial evidence in the record as a whole" but gave no indication whatsoever that it had taken into account the evidence that detracted from the NLRB's position or the evidence from which conflicting inferences could be drawn, did the court of appeals fulfill its obligation to view the record in its entirety "including the body of evidence opposed to the Board's view" as required by this Court's decision in *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 488-489 (1951)?

2. Whether, as a matter of law, a discharged employee used "reasonable efforts" to obtain substantially equivalent interim employment when it is undisputed that the employee during an eight-year backpay period (i) applied for only one job through the local newspaper want ads that contained numerous suitable employment opportunities; (ii) failed to use a private employment agency and did not apply for a single job through the state employment bureau; (iii) succeeded in obtaining only one employment which she quit after a brief six month period; and (iv) from 1971 through 1974 searched for employment on approximately 10% of the business days in each year and from 1974 through 1979 searched for employment on approximately one day per month?

3. Is this Court's review necessary to protect petitioner's due process right to a fair hearing where an administrative law judge refused to admit into the hearing record relevant evidence, including admissions against interest made by the charging party and the Board's agents and where the NLRB and the court of appeals refused to address petitioner's due process contentions?

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—VS.—

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner S.E. Nichols of Ohio, Inc., ("Nichols") respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on April 15, 1983 enforcing an order of the National Labor Relations Board ("NLRB" or the "Board") entered against Nichols on September 18, 1981.

Opinions Below

The opinion of the Court of Appeals is reported at 704 F.2d 921 (6th Cir. 1983), and appears in the appendix hereto ("App.") at 1a. The opinion of the NLRB is reported at 258 NLRB No. 2, 1981 and appears at App. 8a. That opinion affirmed the decision of an Administrative Law Judge (the "ALJ") which appears at App. 16a.

Jurisdiction

The judgment of the Court of Appeals was entered on April 15, 1983. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Statutes Involved

Section 10(c) of the National Labor Relations Act, in pertinent part, provides:

> If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter; *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him. . . .

29 U.S.C. § 160(c).

Section 10(e) of the National Labor Relations Act, in pertinent part, provides:

> The Board shall have power to petition any court of appeals of the United States, . . . for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. . . . The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or

> agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. . . .

29 U.S.C. §160(e).

Statement of the Case

This petition brings to this Court for review a consolidated proceeding launched by respondent NLRB against petitioner Nichols. The consolidated proceedings resulted in the issuance of the Board's supplemental order and decision dated September 18, 1981 (App. 8a).

The Board applied to the United States Court of Appeals for the Sixth Circuit for enforcement of the Board's order. Nichols answered and cross-petitioned. By decision filed April 15, 1983 the Court of Appeals granted enforcement (App. 1a).

(1) The Consolidated Proceedings

The Unfair Labor Practice Proceeding

Nichols operates a self-service, retail discount department store with approximately 120,000 square feet of selling space, in New Philadelphia, Ohio. On April 19, 1979 Nichols' employee Lena Barnhart ("Barnhart") filed an unfair labor practice charge (Case No. 8-CA-12772), claiming only that she had been constructively discharged following her February, 1979, reemployment. One month later she withdrew this charge.

On or about June 12, 1979—after the Board instituted the supplementary back pay proceeding hereinafter described—Barnhart once again filed an unfair labor practice charge, which was identical to the one she had filed in April and withdrawn. This charge was assigned Case No. 8-CA-12909.

The complaint that the Board issued four months later on October 15, 1979, based upon the latter charge, alleged that Nichols had refused to reinstate Barnhart to her former position because of her alleged involvement in protected activities and because she had given testimony in prior Board proceedings.*[1] In addition, it alleged that, on February 17, 1979, Nichols improperly reinstated Barnhart and that, on or about March 19, 1979, she was constructively discharged. As above noted, in the charge that she had filed Barnhart only asserted a claim for constructive discharge and did not assert any claim that she had been improperly reinstated.

On October 25, 1979, Nichols filed its answer containing several affirmative defenses, including the following: (a) that Barnhart was properly and fully reinstated on February 27, 1979; (b) that Barnhart quit Nichols' employ on March 19, 1979 without justification; (c) that Barnhart was engaged in a scheme to obtain monies from Nichols without performing any work; and (d) that the Board by its conduct and procedures, is biased against Nichols and has deprived Nichols of its rights to due process, to a fair hearing, and to equal protection of the laws.

The Back Pay Proceeding
(NLRB Case Nos. 8-CA-6414, 7858, 9160)

On April 19, 1979, the Board's Regional Director had issued back pay specifications which contained a notice of hearing for

1*There had been no union activity at the store for years—the Record is barren of any attempt at the hearing to show that Barnhart's quit had any relationship to "protected activities" or prior testimony. For how long is the Board to be permitted to rely upon such unsupported, unprovable assertions. Neither the Union nor the employees raised these contentions as to the 1979 reinstatement.

August 7, 1979. In this proceeding the Board sought back pay (i) for Carolyn Moore ("Moore") in the sum of $24,846.36 plus interest at 6% for an alleged back pay period of April 1, 1971 to February 27, 1979; and (ii) for Barnhart $34,121.47 plus interest at 6% for Barnhart for the same alleged back pay period. Nichols answered on June 25, 1979. The Regional Director filed an amendment to the back pay specifications on October 5, 1979, the principal purpose of which was to remove the February 27, 1979 limit on back pay for Barnhart. The Board asserted that, as to her back pay "continues unabated to the present because no proper offer of reinstatement has been made to her." The back pay hearing was rescheduled for November 8, 1979.

On October 17, 1979, Nichols served and filed a combined answer to the back pay specification and to the amendment thereto.

Consolidation of the Proceedings

On October 15, 1979—less than three weeks before the back pay hearing, more than four months after Barnhart filed her new charge, and over two months since the NLRB investigated the matter and took statements from management—the Regional Director issued an order consolidating the new unfair labor practice proceeding with the pending back pay proceedings for "purposes of hearing, ruling and decision. . . ." In this same document, the Board set forth for the first time, the above mentioned complaint allegedly based on Barnhart's June 12, 1979 charge, and, simultaneously, scheduled a hearing on the complaint for November 5, 1979—the date then set for the back pay hearing.

Petitioner moved to sever the proceedings and requested an order *inter alia* directing that no hearing be held in Case 8-CA-12909 until it is severed from the back pay proceeding, and that the hearing and decision in Case 8-CA-12909 be conducted and rendered separate and apart from the hearing in the back pay proceeding. As set forth in the motion to sever, and

as hereinafter shown, Nichols was severely prejudiced by such consolidation. The motion to sever was denied by the ALJ at the start of the hearings.

By letter dated November 15, 1979 petitioner requested General Counsel's approval for the service upon the Regional Director of the Board's Region 8 of *subpoenas ad testificandum* and *duces tecum*, to be returnable at the hearing. By telegram dated November 27, 1979 the request was denied. Petitioner has persisted in its objection to this ruling and the procedure pursuant to which it was issued, all of which denied it the opportunity to obtain documentary evidence and testimony relevant to the issues raised by the defenses in the back pay and unfair labor practice proceedings and further denied petitioner its Constitutional due process right to a fair hearing.

The Board's Decision and the Court of Appeals Affirmance

Without critically or analytically addressing any aspect of the ALJ's decision the Board broad brushed the matter, rubber stamped that decision and stated merely that it "has decided to affirm the rulings, findings and conclusions of the Administrative Law Judge . . ." App. 9a). The Court of Appeals in deciding to enforce the Board's order did not fairly search the record because such search could not yield the conclusion that . . . "The administrative record offers ample support for the findings of fact and credibility determinations which underlie the conclusion that Nichols 'constructively' discharged Barnhart in March of 1979."

Reasons for Granting the Writ

A. The decision of the Court of Appeals fails to follow this Court's directive contained in Universal Camera Corporation v. NLRB.

The Board and the Court below did not view the record of the hearing as a whole and did not take into account considerable evidence including Barnhart's own testimony that fairly

detracted from and fully contradicted the Board's evidence and the ALJ's findings.

This Court (Mr. Justice Frankfurter) in *Universal Camera Corporation* v. *N.L.R.B.*, 340 U.S. 474 (1951), in pertinent part wrote as follows:

> Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation definitely precludes such a theory of review and bars its practice. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. This is clearly the significance of the requirement in both statutes that courts consider the whole record. Committee reports and the adoption in the Administrative Procedure Act of the minority views of the Attorney General's Committee demonstrate that to enjoin such a duty on the reviewing court was one of the important purposes of the movement which eventuated in that enactment. (at 487-488)
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> . . . .
>
> We conclude, therefore, that the Administrative Procedure Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds. That responsibility is not less real because it is limited to enforcing the requirement that evidence appear substantial when viewed, on the record as a whole, by courts invested with the authority and enjoying the prestige of the Courts

> of Appeals. The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matter within its special competence or both (340 U.S. 490).

The Sixth Circuit cited *Universal Camera*, 340 U.S. at 493, for the proposition that "the Court may not substitute its judgment for that of the Board even if it might have reached different conclusions in a hearing *de novo*." We respectfully submit that p. 493 of 340 U.S. does not contain support for that proposition. Indeed, at 340 U.S. 488-489, Mr. Justice Frankfurter wrote as follows:

> To be sure, the requirement for canvassing 'the whole record' in order to ascertain substantiality does not furnish a calculus of value by which a reviewing court can assess the evidence. Nor was it intended to negative the function of the Labor Board as one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect. Nor does it mean that even as to matters not requiring expertise a court may displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*. Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view.

As demonstrated hereinafter, by a summary of the salient facts contained in the administrative record, the Sixth Circuit in affirm-

ing the Board grossly misapplied or misapprehended the substantial evidence standard of review. That standard as enunciated by this Court in *Universal Camera* prohibits a Court of Appeals from affirming a decision of the NLRB without examining the entire administrative record including all evidence contrary to the Board's position or evidence from which inferences could be drawn conflicting with the Board's findings. The Sixth Circuit and the Board in the present case ignored the significant evidence introduced by the employer which was diametrically opposed to the Board's proof and contentions. Thus, the Court of Appeals should have reviewed the record in its entirety including the evidence opposed to the Board's view, to determine whether substantial evidence supports the Board's decision. In the case at bar the ALJ, the Board and the Court below totally ignored persuasive evidence opposed to the Board's view.

As shown hereinafter, another Circuit has applied the *Universal Camera* standard of review in accordance with its clear terms and searched the entire record, including the employer's testimony that the ALJ either ignored, failed to credit or misconstrued. It is appropriate for this Court, on the present record, to grant this petition and reaffirm the precept of *Universal Camera*. As stated in *Universal Camera* where the substantial evidence standard of review "appears to have been misapprehended or grossly misapplied," this Court will intervene. This is just such a case.

Significantly, the Court of Appeals at the outset of its decision makes two crucial findings that demonstrate both the failure below to view the record as a whole and the prejudice from which petitioner suffered throughout the prior proceedings. The Court of Appeals found that upon her reinstatement in February 1979 Barnhart "was instructed to 'float' between departments on an 'as needed' basis and that on March 19, 1979 Barnhart received conflicting job assignments from different supervisors." The Sixth Circuit then proceeded to tie the knot by contending—without record support—that the alleged conflicting assignments "cul-

minated in a confrontation with the store manager, who reprimanded Barnhart publicly and in the presence of other Nichols' personnel. Barnhart clocked out and did not return to work. An unfair labor practice charge alleging 'constructive discharge' was filed on her behalf" (App. 3a). It is inconceivable that a fair reading of the entire record could produce these conclusions.

A constructive discharge occurs when "an employer deliberately renders the employee's working conditions intolerable and thus forces him to quit his job," *Muller* v. *U.S. Steel Corp.*, 509 F.2d 923, 929 (10th Cir.), *cert. denied*, 423 U.S. 825 (1975); *Young* v. *Southwestern Savings and Loan Association*, 509 F.2d 140, 144 (5th Cir. 1975); *Montgomery Ward & Co.* v. *NLRB*, 377 F.2d 452 (6th Cir. 1967). If the Sixth Circuit had followed *Universal Camera* and reviewed the entire record as a whole, it could not have found that Barnhart was constructively discharged.

Barnhart's 1979 Reinstatement and Quit

When Barnhart was reemployed on February 27, 1979, the store manager told her that he wanted to start out anew and to forget the past; that he had an open door policy and that if she had any problems or questions, she should feel free to come to him; he explained that he considered the past to be water under the bridge, that he was going to let bygones be bygones and get a new start. He stated that all he expected was a fair day's work for a fair day's pay.*[2]

Barnhart was assigned a job as a clerk in the lamp department. Though the ALJ employed every artifice to make it seem otherwise—(and his decision and approach has been rubber stamped to this point)—a truly objective view of the facts demonstrates beyond a doubt that this assignment was the substantial equiva-

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[2]*The manager held this discussion because of the prior unfair labor practice proceedings and Nichols desired to avoid a repetition of such proceedings.

lent of her former position. When the store was busy she would be asked to help out at the front registers. Barnhart admitted there were three or four other girls among a night crew of twenty to twenty-four employees who were moved to the front registers when needed. Barnhart testified that when she previously worked in the store, it was policy for an employee to help out in other departments and that she did so. It was a distortion of the record for the Court of Appeals to describe Barnhart's assignment as a "floater." She was treated the same as other clerks and would have been treated no differently if she had never left Nichols employ. The charge that she filed did not contain any assertion concerning her job assignment.

An unbiased view of the record as a whole belies the foregoing findings of the Court of Appeals. As briefly described hereinafter the overwhelming evidence contradicts the description of Barnhart's job as one of a "floater." Furthermore, Barnhart described herself as fully satisfied with the work she had been assigned and her quit was unrelated to any alleged conflicting assignment.

In the charge she filed Barnhart only alleged that on or about March 19, 1979 she was constructively discharged because of her union membership and activities and because she gave testimony in prior unfair labor practice cases.* As noted above, the complaint which was issued on October 15, 1979, in addition to alleging a constructive discharge, alleged, for the first time, that on February 27, 1979 Nichols had refused to properly reinstate Barnhart. The complaint failed to state in what respect the reinstatement was improper. During the hearing it became crystal clear why no such detail could have been pleaded. There were no facts to support the *pro forma* allegation of improper reinstatement; Barnhart had not complained about the wages, hours or clerks position to which she had been reinstated. Furthermore, the record demonstrates and the ALJ agreed that all employees, other than managers, were essentially clerks performing the same duties (App. 24a).

*See footnote 1 *supra*.

Barnhart had no problems working in the lamp department and testified that she was not unhappy with anything she was asked to do and that she was pleased. She was assigned duties by the lamp department head, Francis Kee ("Kee"). Barnhart further testified that not only was she satisfied with the work but that up to March 12th she was satisfied with everything that happened in the store.

On the latter date Barnhart was asked by assistant manager Dill to help put the housewares department in shape, because it had become disorganized. The record evidence—without contradiction—established that it was common practice and policy to temporarily shift employees from one department to another to help straighten up or shelve merchandise. Since the store had about 20 to 24 employees at night compared to approximately 50 during the day, the manager could not have one employee in every department at night; therefore, employees were asked to help out wherever they were needed. Even office employees were used to help straighten out a department or shelve merchandise. Hedy Fondriest, a night employee in the office, testified to the numerous times she had been used in almost every department to give assistance where needed.*[3] There was therefore nothing unusual about using Barnhart to help straighten out the housewares department.

Accordingly, despite the ALJ's pointed failure to face the record facts and his evasive attempt to portray as "unique" Barnhart's brief transfer to the housewares department, it is clear that such temporary transfers were commonplace and the procedure was well known to the employees. Any available employee would have been given that assignment. Approximately two weeks before, four or five other night people helped out in that department.

Barnhart specifically testified that she didn't mind going to straighten out housewares because "it was a challenge." She

[3]*Significantly, the decision of the Administrative Law Judge totally ignored the testimony of fellow employee Fondriest and ignored as well other conclusive evidence that supports petitioner's position.

wasn't assigned to housewares for any particular period, just as long as it took to help get it in shape. When she previously worked for Nichols she had been a clerk, not permanently assigned to a register. When reinstated in 1979 she was given the same job and was subject to the same work conditions, which included helping out in other departments. She therefore had no cause for complaint and did not complain about her assignment.

On this subject, the Court below in disregard of Barnhart's own testimony and without record support attempted to equate Barnhart's 1979 reemployment to the "scrub" duty which she had been asked to do upon her prior reinstatement. This treatment by the Sixth Circuit and the Board was totally unfounded and demonstrates the prejudice that petitioner has suffered from the consolidation of the proceedings and from the Board and the ALJ desperately misconstruing and misdescribing the facts in order to vitiate petitioner's good faith effort to reinstate this employee in February 1979. The record simply does not support any contention that Barnhart's 1979 duties were "onerous" or "unpleasant" or that she quit for that reason.

The record does not support the ALJ's finding that Nichols made no effort to restore Barnhart to her former position as clerk of the men's wear department and made no explanation for not doing so (App. 34a). The record evidence and case law precedent overwhelmingly contradicts the ALJ's premise that only reinstatement to the men's wear department was permissible. An employer is not required to reinstate an employee to a job requiring the performance of exactly the same duties previously performed. *NLRB* v. *Skinner Kennedy*, 113 F.2d 667, 671 (8th Cir. 1940); *Barkers East Main Corporation*, 136 NLRB 494, (1962) CCH NLRB ¶11,056; Barnhart was reinstated in good faith to virtually the identical position she formerly held. She was asked to help out in another department only because of valid business reasons applicable to all sales clerks at the time. In no way was Barnhart singled out for different treatment than she would have received if she had been continuously employed.

The Facts Relating to the Constructive Discharge Claim

The Board and the Court below uncritically rubber stamped the ALJ's finding that Petitioner's conduct from February 27 to March 19, 1979, culminating in the events of March 19, constituted a constructive discharge of Barnhart. The Board and the Court below refused to look at the record as a whole, ignored the testimony of Barnhart's fellow employees and other witnesses, just as the ALJ had ignored such testimony, and adopted every misinterpretation or erroneous assumption made by the ALJ. The record facts which were totally ignored below concerning Barnhart's quit belie any constructive discharge claims. The simple facts leading to her walking off the job are as follows:

While Barnhart was helping reorganize the housewares department, a large shipment of merchandise was received which required additional people to check and shelve goods. People on the day shift were sent to help out, including Paula Powers. Barnhart told Powers to "stock it" herself with respect to the merchandise which Powers had checked in and which she asked Barnhart to help put on the shelves. Barnhart's conduct towards Powers was a rude, unreasonable response to a nonprovocative situation. Here again the ALJ totally misconstrued the evidence (App. 30a). Robert Hathorn, then an assistant manager, testified that Barnhart's response to Powers was inappropriate. In any event, based upon her one conversation with fellow employee Powers, Barnhart asked Hathorn about conspiracies against her and complained about being bossed around. She later told Hathorn that "nobody is telling me what to do."[4]

Barnhart's impudent statement to an assistant manager, that nobody can tell her what to do, and her lack of cooperation with a fellow employee, make it clear that Barnhart was attempting to provoke an incident and that she had a "chip on her shoul-

[4]"There is no basis whatever for ignoring Barnhart's provocative conduct in this regard. In any event, when she quit some days later, she made no mention of this; her quitting was prompted solely by her March 19th conversation with the store manager about lateness and gum chewing.

der." The events of March 15th do not represent a problem between Barnhart and management since her dispute was with Powers, a fellow employee who was not a part of management.

On Friday, March 16th, Barnhart was off; on March 17th she worked in housewares and on Sunday March 18th she worked at a register all day because the head cashier was sick. It is clear that there were no problems between Barnhart and management on those days.

On March 19, 1979, Kee (head of the lamp department), after obtaining the store manager's approval, told Barnhart she was to return to the lamp department. The ALJ—having completely ignored the record evidence detrimental to Barnhart found "it hard to believe" Kee's testimony (App. 31a). Petitioner finds it hard to believe how the ALJ could view the record with blinders—seeing only what he chose to see and create a credibility issue where none existed. The record is clear that Barnhart had been assigned to the lamp department and that Kee, head of the department, regularly gave Barnhart instructions. There had been no difficulty between them; once again the prejudice of the ALJ shows through.

Contrary to Barnhart's assertion—raised for the first time at the hearing—she had not been promised permanent assignment to housewares. Assistant manager Dill did not ask Barnhart to remain in housewares on a permanent basis. The belated assertion of a promised permanent assignment to housewares is incredible in view of the uncontrovertible testimony that there had been no permanent night person in housewares for several years and in view of the fact that this assertion was not raised in any manner until the hearing.

Here again with no basis in the record, the ALJ sought to make this a credibility issue and "credit[s] Barnhart's account that she was promised the housewares job" (App. 31a). This finding is incomprehensible, contrary to the overwhelming weight of the evidence and must be rejected for the simple reason—if for

no other—that Barnhart knew Dill could not give her a job without the store manager's approval. The ALJ in seeking a foundation for his finding of constructive discharge sought to create a factual pretext to convert Barnhart's eventual walk-out into an improper discharge. When she walked off the job, she did not quit because of her job assignment.

On March 19th, after Barnhart returned to work in the lamp department and had finished what she had been asked to do, she asked assistant manager Caravati for more work. He asked her to go with him to the stockroom and put lamps in numerical order so that they could be easily obtained from inventory. On their way they were met by store manager Ricer. He had been advised by the payroll clerk that Barnhart had taken breaks in excess of the established 10 minute period.

When Ricer met Barnhart and Caravati, he simply advised Barnhart that she had been taking too long on her breaks and that she was to take only ten minute breaks. He noticed that she was chewing gum, in violation of store policy and told her to take the gum out of her mouth. Barnhart responded by saying "yes sir," and walked back toward the lamp department. About 25 minutes later Barnhart left her work, suddenly came to the office window after punching out, and advised Ricer that she was going home. He asked her if she was sick; Barnhart said she didn't like to be spoken to like a dog. Ricer reminded her that all he had done was to mention that she should take ten minute breaks and not chew gum on the sales floor. Barnhart said she was going home, Ricer said good night and Barnhart responded by saying it was not good night but good-bye and that her lawyer would be in touch. This conversation was overheard clearly by assistant managers Caravati and Hathorn and by employee Fondriest.*[5] Barnhart then left the store.

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[5]*The Administrative Law Judge completely ignored Ms. Fondreist's testimony.

Barnhart's quitting did not relate to her reinstatement or job assignment; her quit was prompted by her reaction to Ricer's telling her to take ten minute breaks and not chew gum on the sales floor. There is no question from the time cards that Barnhart had taken breaks in excess of ten minutes, nor did Barnhart dispute this. When Ricer spoke to her there was no doubt in her mind that she had taken such breaks. The testimony showed that other employees had been disciplined and even fired for continued infractions of break, lunch or reporting time requirements. The ALJ, the Board and the Court below ignored this evidence and testimony of other employees that Ricer, as a common practice, talked to employees on the floor about chewing gum and about lateness. (Employees, Kee and Fondreist, testified that they had been spoken to by Ricer on numerous occasions about gum chewing.)

Furthermore, the ALJ's description of Ricer's conversation with Barnhart concerning "two matters of personal conduct" is an invention of the ALJ (App. 35a). It must be emphasized that Barnhart was not given a warning; no adverse consequences or disciplinary action were threatened as a result of her time infractions. She was simply reminded of the store rules concerning breaks and gum chewing and asked to adhere to them. That certainly does not constitute cause for a quit. Simply talking to her about this in front of another supervisor was not contrary to policy. Other employees were not present; there was no need to hold such brief, informal discussion in the office. Nor is it relevant that Ricer "had not previously mentioned" these matters to Barnhart.*[6] Ricer had not publicly reprimanded Barnhart for taking a 20 minute break as the ALJ would make it appear (App. 35-36a) but only spoke to her in the presence of an assistant manager. Barnhart maneuvered herself into a position to claim constructive discharge and simply chose to walk out because she really

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[6]*Again, the ALJ's mention of Ricer's concession on cross-examination that he never disciplined employees for those infractions is a non-sequitur since Ricer was not disciplining Barnhart. The ALJ's entire approach here reveals the depth of his bias against respondent.

didn't want to work.*[7] Barnhart's history of inability to obtain employment during the prior eight years, casts some doubt on her desire to work.

The ALJ's version of the events of March 19, is pure fiction—barren of record support. When viewed against the entire record, the Board's and the Court of Appeals' rubber stamping of these unsupported findings—without evaluation of the contrary evidence or of the evidence from which conflicting inferences could be drawn—is sufficient to warrant review by this Court. Thus, the following incorrect findings of the ALJ, among others, without record support or contrary to the record evidence, have been perpetuated:

(a) In the third week of her employment changes began with the assignment of Barnhart to a heavy clean-up job . . . (App. 34a).

(b) On March 17, 1979 Assistant Manager Dill offered, and Barnhart accepted, a regular asignment as clerk of the housewares department (App. 35a).

(c) Manager Ricer "yanked" Barnhart back to the lamps department for additional clean up work (App. 35a).

(d) He did this "in the humiliating fashion of having a fellow employee rather than a supervisor give these instructions to Barnhart . . . in effect letting Barnhart know that she was just a utility girl assisting other employees" (App. 35a).

The ALJ misconstrued and misdescribed the evidence, in order to justify the conclusion he sought to reach. The Board and the Court below have perpetuated these improper findings by failing to view the entire record and by ignoring among other facts evidence contrary to the Board's view including the evidence that store personnel went out of their way to try and avoid problems with her. When Barnhart advised assistant manager Hathorn

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[7]*A constructive discharge occurs where an employer makes an employee's conditions of employment intolerable. *Fashion Fair, Inc.*, 163 NLRB No. 22, 1967 CCH NLRB ¶21,129 (1967). See p. 10 *supra*.

on March 15th that nobody could tell her what to do, Hathorn could have sent Barnhart home for insubordination—instead, he just walked away. Employee Fondriest testified that "everybody treated her [Barnhart] really nice."

In view of all the foregoing, it is quite apparent that Barnhart purposefully walked off the job on March 19th without any justification whatsoever. From her own statement at the time, her quit related solely to the tone in which she perceived the store manager to have spoken to her earlier that evening. Respondent did not constructively discharge Barnhart. Her working conditions were by no means made uncomfortable or intolerable. She was treated the same as other employees in every respect. Barnhart could not and did not complain that her transfer to housewares and return to the lamp department constituted a constructive discharge, since others were given the same assignment and it was done pursuant to a justifiable, reasonable management need and policy.** A true review of the full record facts will demonstrate that Barnhart was properly reinstated on February 27, 1979 and that she was not thereafter constructively discharged.

Standard Of Review

In reviewing the ALJ's decision, the Board may accept the ALJ's findings only when they are supported by substantial evidence based on the *record as a whole. Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 493 (1951); *NLRB* v. *Tennessee Packers Inc., Frosty Morn Division*, 339 F.2d 203, 204 (6th Cir. 1964). The record as a whole includes the body of evidence presented by the employer. *Universal Camera Corp.* v. *NLRB*, *supra*, 340 U.S. at 488. At bar, the Board refused to objectively consider the substantial evidence presented by Nichols and the

**When such moves are the result of justifiable business reasons, they do not provide the basis for an alleged constructive discharge. *NLRB* v. *Brennan's, Inc.*, 366 F.2d 560 (5th Cir.), *modified on other grounds*, 368 F.2d 1004 (5th Cir. 1966).

uncontroverted testimony—including that of Barnhart herself—which clearly demonstrated that she was reinstated to substantially the same position she formerly held. Thus, the Board failed to apply the proper standard of review and its findings should have been set aside.

The Court of Appeals was not bound to accept the Board's findings where as here the Board totally ignored the compelling evidence presented by respondent below:

> [A] reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, *including the body of evidence opposed* to the *Board's view*. (Emphasis added).

Universal Camera Corp. v. *NLRB, supra,* 340 U.S. 488.

The Board refused to look at the whole record in adopting the ALJ's finding that Nichols constructively discharged Barnhart, Now the Court below, without examination, has accepted each and every unsupported assumption of the ALJ on this subject, and ignored the evidence which clearly demonstrated that Barnhart walked out of the store on March 19, 1979, without any justification whatsoever, simply because of her alleged perception of the tone in which the manager had spoken to her.

The ALJ's decision and the Board's decision rely primarily upon a rehash—incorrect in many key aspects—of the prior disputes between the parties relating to past efforts to reinstate Barnhart and Moore. This approach followed by the Board from the inception of Barnhart's 1979 unfair labor practice charge made it impossible for petitioner to fulfill its intention to let bygones be bygones and restore Barnhart to a clerk's position virtually identical to the one she formerly held.

In a similar case, the Court of Appeals for the Seventh Circuit reviewed the entire record and applied the substantial evidence test of *Universal Camera, supra,* in a manner clearly different from the procedure employed by the Sixth Circuit here below. (See, *Portable Electric Tools, Inc.* v. *N.L.R.B.*, 309 F.2d 423 (1962).

In *Portable Electric* a review of the entire record including the evidence unfavorable to the Board led the Court of Appeals to find that the Trial Examiner's analysis of the evidence was "labored" and did "not warrant a finding that the real reason" for the discharge in that case was "union activity absent independent evidence that such activity existed and that the company knew of it" 309 F.2d 426.

The Trial Examiner in *Portable* as did the ALJ at bar relied exclusively upon the testimony of the charging party and ignored the contrary evidence introduced by the employer. The Seventh Circuit, however, searched the entire record and reversed the Board's order. In so doing, the Seventh Circuit significantly described its appellate function as follows:

> If this Court, however, is not to be 'merely the judicial echo of the Board's conclusion' then its determination must "be set aside when the record * * * clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both. * * * The substantiality of evidence must take into account whatever in the record fairly detracts from its weight." Universal Camera Corp. v. N. L. R. B., 340 U.S. 474, 71 S.Ct. 446, 95 L.Ed. 456. While recognizing that the question of credibility is for the trial examiner, an Appeals Court is not precluded from independently determining what weight certain testimony which he finds credible should be given when evaluating the evidence on the record as a whole.

At bar—the ALJ, the Board and the Court of Appeals have

ignored petitioner's evidence, created issues of credibility where none exist and engaged in unsupported supposition, all aimed at shifting to petitioner the burden of proof as to the issues of constructive discharge and reinstatement.

B. The Court below incorrectly decided an important issue concerning the duty of an employer to mitigate under Section 10(c) of the National Labor Relations Act which has not been, but should be, settled by this Court.

This case presents an important issue of federal labor law involving one of the fundamental purposes of the National Labor Relations Act ("NLRA"). To further the NLRA's policies of promoting peaceful resolution of labor disputes and full employment, an employee, even one discharged for union activity, has the duty to make a reasonably diligent search for interim employment during the back pay period. The Sixth Circuit's decision is in direct conflict with both this clear policy of the NLRA's and the case law interpreting Section 10(c) of the NLRA. It is necessary for this Court to grant this petition for certiorari to vindicate the policy of the NLRA and settle a conflict in the case law concerning an employee's duty to mitigate under Section 10(c).

This Court, in order to further the "healthy policy of promoting production and employment" underlying the NLRA, has held that back pay awards must be reduced by any "willful loss of earnings." *Phelps Dodge Corp.* v. *NLRB.*, 313 U.S. 177, 197-198, 200 (1941). *See NLRB* v. *Seven-Up Co.*, 344 U.S. 344, 346 (1953); *NLRB* v. *Mercy Peninsula Ambulance Service*, 589 F.2d 1014, 1017 (9th Cir. 1979).

Recognizing this policy, the courts have required a discharged employee to make a reasonable effort to find new employment, substantially equivalent to the position formerly held, and which is suitable to the employee's background and experience. *See NLRB* v. *Mercy Peninsula Ambulance Service*, 589 F.2d 1014, 1018-19 (9th Cir. 1979); *NLRB* v. *Southern Silk Mills, Inc.*, 242

F.2d 697, 700 (6th Cir. 1957); *cert. denied,* 355 U.S. 821 (957); *McCann Steel Co.* v. *NLRB,* 570 F.2d 652, 655 (6th Cir. 1978).

This Court's review of the decision below is sought to delineate the scope of the "reasonable effort" standard. Petitioner submits that even a cursory review of the factual findings of the ALJ, which findings were adopted by the NLRB and the Sixth Circuit, reveals that Barnhart's efforts to seek new employment do not even approach the "reasonable efforts" standard. The effect of the decision below will be to encourage idleness on the part of discharged employees and thereby undermine the purpose of the NLRA.

In reaching the conclusion that Barnhart used reasonable efforts to find interim employment the ALJ reasoned:

> In evaluating Barnhart's efforts to obtain interim employment, while Respondent looked at and counted only the number of days Barnhart sought employment, General Counsel looked, rightly I believe, at the actual visits to and inquiries of individual employers (because in a day's trip Barnhart usually called upon several potential employers in common locations or close to each other), the repeat visits, and the visits to the state employment service. Thus General Counsel calculated that in the approximate eight years' back pay period dealt with at trial, from April 1971 to November 1979 (which excluded the six month interim employment with Quik Shops in 1974 and the 21-week withdrawal from the employment market in 1976), *Barnhart made about 500 tries at obtaining employment in an approximate 400 week period.* Scrutinizing the entire back pay period . . . it appears that Barnhart averaged better than one job inquiry per week in the entire eight year period. Her reapplications over the months and years to places that had not accepted her previously did not detract from the reasonableness of her effort . . . . (App. 54a) (emphasis added).

Petitioner submits that it was incorrect, as a matter of law, to solely premise this decision on Barnhart's purported "tries" at obtaining interim employment because her "tries" were not indicative of a realistic, reasonable effort to obtain new employment. For example, the record contains overwhelmingly undisputed testimony and evidence that: (1) She frequently failed to follow up by visit or telephone places where she claims to have left a job application or where she otherwise claims to have sought employment; (2) She would go to places looking for work without any indication of whether or not there might be a job available; and (3) She would visit employers based upon the fact that they were close to her home or close to each other. For example, if she went to a shopping center, she would visit several stores in the center—without any reason to believe that a job was available.

A more telling indication of Barnhart's haphazard search for work is the undisputed number of days on which she attempted to obtain employment. Indeed, according to her own diaries, she looked for work only 33 days in 1971, 29 days in 1972, 20 days in 1973, 7 days in 1974, 16 days in 1975, 14 days in 1976, 12 days in 1977, 13 days in 1978 and 6 days in 1979. In other words, from 1971 to 1974 Barnhart searched for employment on approximately less than 10% of the business days in each year and from 1974 to 1979 searched for employment on approximately one day per month. It is necessary for this Court to grant this petition in order to establish that, as a matter of law, in the light of the policy behind the NLRA, such negligible search cannot constitute "reasonable efforts."

Indeed, analogous decisions of both the NLRB and the Ninth Circuit have so held. In *Flite Chief Inc.*, 246 NLRB No. 55 (1979), *enforced in pertinent part*, 640 F.2d 989 (9th Cir. 1981), the Board affirmed as modified a decision specifically holding that looking for a job once a month does not meet the duty of using reasonable efforts. There, in a decision diametrically opposed to the one at bar, the administrative law judge specifically held that:

> Ford made attempts at securing employment an average of *only once a month during each of the 49 months which comprise the back pay period.* Ford offered no excuse or explanation for her obvious lack of effort to secure an interim part-time job to replace the one she had lost when Respondents discharged her. I do not believe that it is reasonable to conclude that so few attempts at securing interim employment constitutes "reasonable diligence."

Furthermore, in *NLRB* v. *Mercy Peninsula Ambulance Service*, 589 F.2d 1014 (9th Cir. 1979), the Ninth Circuit explicitly held that an employee's attempt at securing employment "an average of only three times a month during each of the nine months that he was in the job market after his discharge" did not constitute "reasonable diligence." *Id.* at 1018. In conflict with the Sixth Circuit, the Ninth Circuit correctly recognized the policy of the Act:

> A worker who has been the victim of an unfair labor practice is not entitled to simply await reimbursement from his or her employer for wages lost, for "the statute was not intended to encourage idleness." . . . To hold otherwise would undermine the "healthy policy" underlying the Act, "promoting production and employment."

Id. at 1017-18. (Footnote and citations omitted).

Thus, this Court's review is necessary to settle this uncertainty in the case law concerning an employee's duty to mitigate under Section 10(c). In addition, this Court should not permit a discharged employee to remain idle during most of a lengthy back pay period with the expectation that she will be able to receive compensation from petitioner in any event. Barnhart was successful in obtaining *only one* interim employment during an eight-year back pay period; a job Barnhart unjustifiably quit after working only six months (App. 49a, 56a).

Moreover, the ALJ found that Barnhart fulfilled her legal duty

of searching for interim employment notwithstanding that she ignored such obvious methods of seeking employment as the newspaper ads and private employment agencies (App. 50a). The ALJ found that throughout the eight-year back pay period Barnhart only applied for one job through the newspaper. Petitioner introduced into evidence at the administrative hearing the local newspaper ads on the days that Barnhart claimed she was looking for work and undisputably they contained numerous suitable employment opportunities.

In addition, the administrative law judge acknowledged in his decision that Barnhart refused to use a local employment agency (App. 50a). Petitioner introduced the head of a local employment agency as a witness at the administrative hearing who testified that there were numerous jobs available for a semi-skilled worker such as Barnhart and that it was his experience that after four to six interviews a person could obtain suitable employment.

Finally, although it is undisputed that Barnhart registered with the state employment agency, the ALJ found that Barnhart did not, throughout the entire eight-year back pay period, apply for a single job through that agency (App. 46a).

This Court should grant certiorari for another important reason. The Sixth Circuit's decision has broad ramifications. The duty to mitigate under Title VII of the Civil Rights Acts of 1964 was "expressly modeled on the back pay provisions of the NLRA. *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 409, 419 & n.11 (1975). Thus, the case law concerning mitigation under the Act generally guides the courts in establishing the duty to mitigate under Title VII. *Ford Motor Co.* v. *EEOC*, —— U.S. ——, 102 S.Ct. 3057 (1982). *See e.g., Sangster* v. *United Air Lines, Inc.*, 633 F.2d 864, 868 (9th Cir. 1980). Therefore, the decision at bar that such a negligible effort satisfied an employee's duty to mitigate under Section 10(c) of the NLRA has wide implications in the Title VII area.

The Court is presented with an issue of national importance involving an important purpose and policy of the NLRA. Accordingly, it is essential that this Court announce clear guidelines to the lower courts and to employers and employees establishing the scope of an employee's duty to mitigate by seeking interim employment during a back pay period.

C. The record herein demonstrates that the Court below and the Board avoided addressing the issue of the flagrant denial of petitioner's constitutional right to due process and a fair hearing, which merits the attention of this Court.

The Sixth Circuit, the Board and the ALJ have continuously avoided coming to grips with petitioner's contention that it was denied due process of law and a fair hearing in this matter. As set forth hereinabove (p. 6), prior to the hearing petitioner, in accordance with the Board's rules, requested general counsel's approval for the service upon the regional director of subpoenas returnable at the hearing. That request was denied. Again at the hearing petitioner's counsel sought the issuance of subpoenas directed to Board personnel to introduce evidence concerning admissions against interest by Barnhart in respect of the charge she had filed which initially had been withdrawn. An offer of proof was tendered and appears in the record, to show that Barnhart and the Board believed that the charge lacked merit and that it had been filed to pressure a settlement of the backpay proceeding. The ALJ blocked this evidence at every turn.

It is well-settled that

> [A] refusal by an administrative agency such as the National Labor Relations Board to receive and consider competent and material evidence offered by a party to a proceeding before it, amounts to a denial of due process. . . . That the Board would or might have reached no different conclusion had the rejected evidence been received, is entirely beside the point . . . a controversy tried before a court or before an administrative agency is not ripe for decision

> until all competent and material evidence proffered by the parties has been received and considered.

Donnelly Garment Co. v. *NLRB*, 123 F.2d 215, 224 (8th Cir. 1941) (citations omitted); on remand, 50 NLRB 241; enf. den. 151 F.2d 854 (8th Cir. 1945); *rev'd on other grounds*, 330 U.S. 219 (1947); on remand 165 F.2d 940.

Admissions against interest made by the charging party at the time she withdrew a prior, identical charge must be relevant and admissible. To deny petitioner the right to introduce evidence of such admissions undermined the hearing and the judicial process, and deprived Petitioner of its constitutional right to a fair hearing. *See NLRB* v. *Burns*, 207 F.2d 434 (8th Cir. 1953). Such denial was reversible error requiring rejection of the Board's Application for Enforcement and remand of this proceeding. *NLRB* v. *Burns, supra; Donnelly Garment Co.* v. *NLRB, supra.*

The ALJ refused to permit evidence and testimony on this subject in a manner that showed an intention to insulate the record from clearly relevant and proper testimony. Thus, for example, without any basis whatsoever for such characterization—the ALJ described the proffered evidence as an effort to inquire into the investigative procedures of the General Counsel and into the mechanics of the investigation.*[9] Nothing could be further from the truth; the ALJ had no basis to make this assumption and to exclude evidence that was so clearly proper and relevant. By preventing any questions concerning Barnhart's filing and withdrawal of her first charge, the ALJ prevented Nichols from adducing testimony to support its defenses.

Petitioner sought to subpoena the Regional Director, to testify, as set forth in an offer of proof. The ALJ refused to issue this subpoena. It should have been self-evident from the record that the Regional Director or his representative possessed non-privi-

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[9]*In response, Nichols' counsel stated "I am not proposing to question either the jurisdiction of the Board to proceed, nor am I suggesting that the Board solicited the charge".

leged, relevant evidence. Under the circumstances the refusal to subpoena the Regional Director was a star-chamber tactic; prosecutor and judge acting as one deprived respondent of its right to a fair trial and to due process of law.

Fundamental fairness requires that an employer be allowed to obtain documents and testimony that may impeach or rebut the evidence against it. "The NLRB cannot hide behind a self-erected wall evidence adverse to its interests as a litigant" and the relevant statutes do "not call for a result so inimical to our traditions of fair trial." *NLRB* v. *Capitol Fish Co.*, 294 F.2d 868, 875 (5th Cir. 1961).

In *Wheeler* v. *NLRB*, 314 F.2d 260 (D.C. Cir. 1963) the employer claimed that it was denied a fair hearing because the Trial Examiner excluded proffered evidence, denied cross-examination of certain adverse witnesses and excluded rebuttal evidence which was tendered by the employer. The court held that the employer was deprived of a fair trial and vacated the Board's order and remanded the proceedings:

> We find it difficult to understand how the Board could dissociate the Examiner's findings and recommendations from the evidence of bargaining history which loomed so large to the Examiner. The refusal to allow the employer to cross-examine on the subject and to present his version of that subject led to a record weighted unfairly against one party. This constituted a denial of due process which can be remedied only by a remand to supplement the record and as supplemented it must be reexamined by the Board.

Id. at 263.

As in *Wheeler*, the ALJ at bar refused to allow petitioner to cross-examine adverse witnesses in violation of petitioner's due process rights.

It is axiomatic that if the order of the Board is found to be

> premised upon an unfair hearing then such order must be set aside and the case remanded to the Board for a new hearing. A. O. Smith Corporation v. N. L. R. B., 7 Cir., 343 F.2d 103, 110 (1965); Tele-Trip Company, Inc. v. N. L. R. B., 4 Cir. 340 F.2d 575, 581 (1965); National Labor Relations Board v. Bryan Mfg. Company, 7 Cir. 196 F.2d 477, 478 (1952). The due process requirement of a fair hearing is unwavering even though the findings of an unfair hearing might otherwise be justified on the merits. National Labor Relations Board v. Phelps, 5 Cir. 136 F.2d 562, 563-564 (1943).
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> *Great Lakes Screw Corporation* v. *NLRB*, 409 F.2d 375, 381-382 (7th Cir. 1969).

The failure of the Sixth Circuit to even address this crucial constitutional due process, fair hearing issue is further confirmation of the petitioner's contention that the entire record was not reviewed below and that a writ of certiorari should issue herein.

CONCLUSION

For each of the foregoing reasons, petitioner requests that this petition for a writ of certiorari be granted.

Dated: New York, New York
July 14, 1983

Respectfully submitted,

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